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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 670

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN MARAS, Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTH-WESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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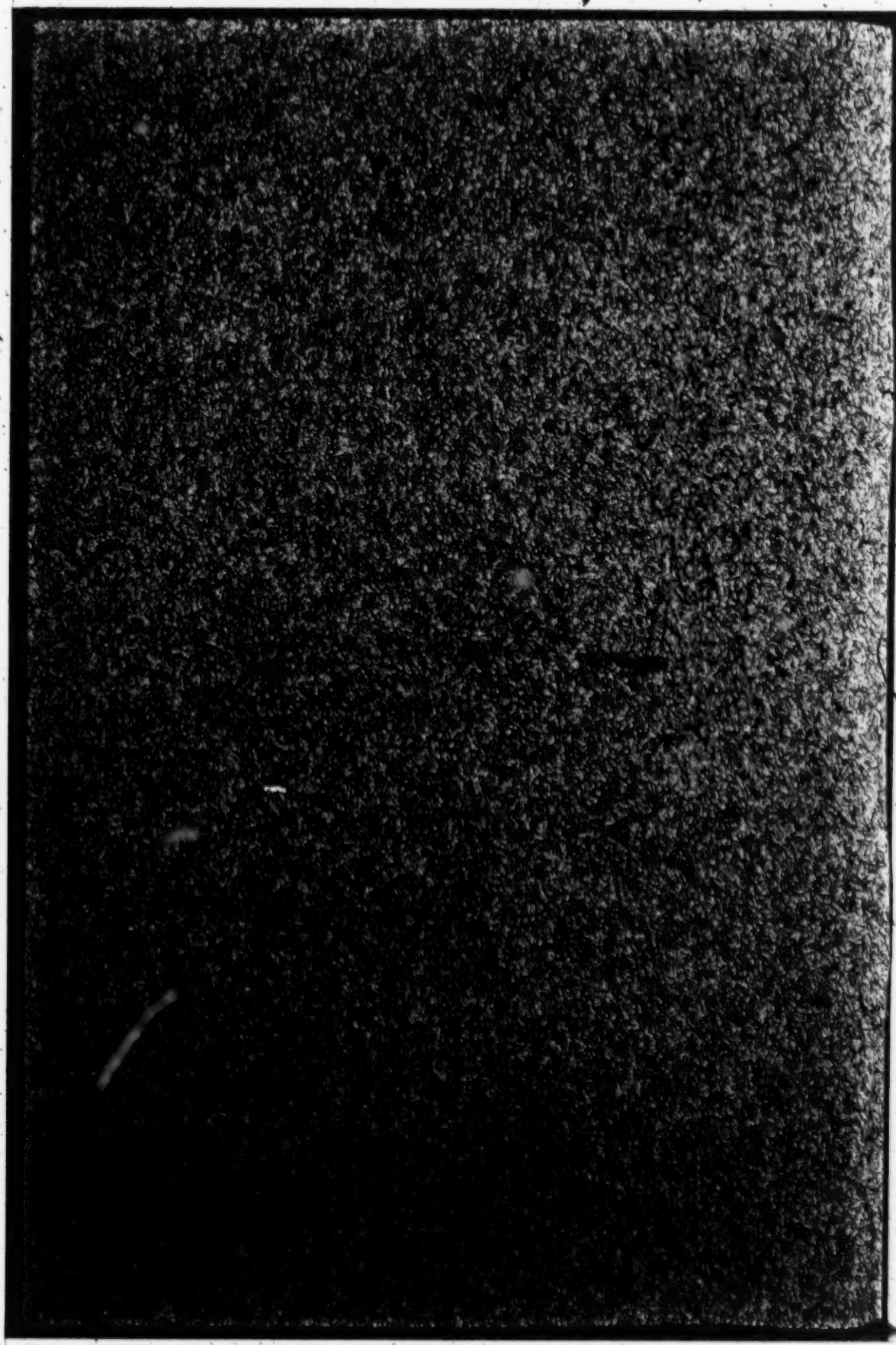
St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.



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No. 670

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN MAERAS, Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois, Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Appellees.

On Appeal from the Supreme Court of Illinois

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees' Motion avoids comment on the substantiality of the constitutional questions involved in this appeal as explained in the Jurisdictional Statement.[1] Appellees deny

[1] Though the questions presented necessarily involve Fourteenth Amendment limitations on property tax discrimination against railroad property, and though certain railroad spokesmen have long remonstrated against property tax discrimination vis a vis non-

the existence of the questions presented and alternatively assert that the questions; substantiality aside, are not within the Court's jurisdiction. We submit that in light of the Jurisdictional Statement and prior decisions the questions are substantial and merit plenary consideration rather than summary disposition. See **Louisville & Nashville Rr. v. Melton, 218 U. S. 36, 49 (1910); Milheim v. Moffatt Tunnel Dist., 262 U. S. 710, 716-17 (1923).**

With deference we submit that the unusual complexity of the case renders both the jurisdictional points and the constitutional questions, as well as the matter of standing, inappropriate for summary disposition. This unusual complexity has led to many inaccurate recitals in Appellees' Motion. Appellant's counsel are presently without the enlarged opportunity for advocacy which accompanies a hearing on the merits.

Congress has conferred appeal, or obligatory, jurisdiction on this Court in only a small group of cases arising from state courts. 28 U. S. C., § 1257 (1) (2). Summary disposition of this complex appeal will conflict with Congressional intent which contemplates disposition of cases within the scope of § 1257 in the light of the added understanding and insight derivable from briefing, oral argument and full deliberation. Furthermore, we submit that the complexities here are such that the spirit of the due process clause in the Fifth Amendment requires that Ap-

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railroad property, Appellees are now silent about the importance of this Court's rendering a clarifying interpretation of the Fourteenth Amendment which would benefit both non-railroad taxpayers and the railroads. See Ogden, "Railroads Deserve Tax Equality," 1960 PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 378, 387; Pierce, "The Case Against Discriminatory State Assessment of Railroad Property for General Property Tax Purposes," 70 Public Utilities Fortnightly No. 7, 434 (1962); "Tax Outrage," Railway Age 21-22 (December 1963) (claiming that of $193,296,558 ad valorem taxes paid by railroads in 24 states for 1961, $112,979,417, or 58.45%, was excessive because of discriminatory levels of assessment).

pellant be granted the opportunity to present a brief on the merits and to argue orally and that the case receive plenary consideration.

JURISDICTION

I. Appellees' Motion Obscures the Constitutional Nature of the State Court's Action Which Brings This Case Within the Scope of the Court's Appeal Jurisdiction

A. "Constructive Fraud" is a Judicial Label in Illinois for Property Tax Discrimination Violative of the State Uniformity Clause

Appellees' representation at 27-9 that the basis of the decision below is "constructive fraud . . . without regard to any provision of the Illinois or Federal Constitution" is false. The representation is anchored at 3, 27-29 to Appellees' misunderstanding of **People ex rel. Callahan v. GM&O, 8 Ill. 2d 66 (1956).** Mr. Justice Schaefer placed **Callahan** in its proper perspective in **CB&Q v. Dept. of Revenue, 17 Ill. 2d 376, 390 (1959).** There the railroad charged, as the Appellees have charged in the case at bar, that the Director of Revenue, in the discharge of his duties as chief property tax administrator, had discriminated against their property. Referring to a failure of proof, Justice Schaefer wrote,

> "If this charge can be substantiated, as to 1957 assessments, the plaintiff's operating property is bearing a disproportionate share of its tax burden in violation of the constitutional requirement of uniformity. Article IX, Sec. 1, Const. of 1870; People ex rel. Callahan v. Gulf, Mobile and Ohio Railroad Co., 8 Ill. 2d 66; Mobile and Ohio Railroad Co. v. Tax Commission, 374 Ill. 75."

The words "constructive fraud," as utilized by the Supreme Court of Illinois in some property tax cases in-

volving allegations of **discrimination**, mean **discrimination violative of the uniformity clause in Article IX, Section 1 of the State Constitution.**[2]

Appellees' use of the words "constructive fraud" in defining the basis of the state action challenged here obscures this Court's appeal jurisdiction. Similarly, Appellees' use of the term "judgment" obscures this Court's view of the substance of the State Court's actions, as their use of the word obscured the view of the Court below of the substance of the Director's actions. Since 1961, in order to decide issues of railroad-alleged property tax discrimination, the Supreme Court of Illinois, in **valuing** non-railroad property, has **rejected** the Director of Revenue's "judgment" which he had used to ignore inflation in **equalizing** locally assessed property assessments, and, in **valuing** railroad property, has **adopted** the administrator's "judgment" which he had used to ignore inflation in **assessing** railroad property.

In relating **assessments** to **values** the Supreme Court below has exercised its judicial power conferred by Article VI, § 1 of the Illinois Constitution to enforce the uniformity clause in Article IX, Section 1 of the Illinois Constitution, notwithstanding the fact that Article IX, Section 1 also provides that valuation is "to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise." If the Supreme Court of Illinois had been controlled by the quoted language, it

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[2] See Cushman, "The Judicial Review of Valuation in Illinois Property Tax Cases," 35 *Ill. L. Rev.* 689, 694-5 (1941); "'Overassessment' and 'Discrimination' Issues in the Supreme Court of Illinois, 1859-1959," People's Brief, Appendix A, II Ill. Sup. Ct. 88; People ex rel. Hillison v. CB&Q, 22 Ill. 2d 88, 96 (1961); People ex rel. Kohorst v. GM&O and C&NW, 22 Ill. 2d 104, 105, 113-4 (1961). See also Parham, "Taxation of Property in Illinois," U. Ill. L. F. 645, 646, 647 (1961).

Emphasis is added throughout this brief unless otherwise noted.

could not legitimately have granted relief to the railroads.[3]

B. The Second Appeal to the Supreme Court of Illinois Established That the Federal Questions Were Decided by That Court in the 1965 Appeal; Ambiguity of the 1965 State Court Decision, Now Removed, and Lack of Finality, Now Removed, Reasonably Explain Dismissal in 1966 of the First Appeal to This Court.

The Record now before the Court establishes that the state uniformity clause underlay the 1965 decision of the Supreme Court of Illinois and that the constitutional questions now presented here were then presented, considered and rejected. See, *e.g.*, Jurisdictional Statement A-2, 3, 4. When this case was here on appeal the first time, the Rec-

[3] The railroads at 13, 18 persist in asserting that Appellant challenges the actions of the Director of Revenue, the responsible chief official of the Department of Revenue. The fact is, of course, that Appellant has defended the Director of Revenue and challenges only action of the Supreme Court of Illinois. It is the railroads who have challenged the actions of the Director of Revenue and the trial court. See 12-13 *infra*. Throughout this litigation the railroads have refused to acknowledge the functional difference between valuation of property, on the one hand, and assessment of property, on the other. Assessment is always an administrative function. Valuation, like equalization, may be either an administrative or a judicial function. In the discrimination case now before the Court, the valuation and equalization functions are judicial. In 1949, when post-World War II inflation was first creating serious problems for property tax administrators, the importance of the valuation problem in the equalization of assessments was articulated by Mr. E. L. Maynard, Chief of the Property Tax Division, Chicago office, of the Illinois Department of Revenue: "It should be emphasized at this point, I believe, that there is a fundamental difference between assessment and equalization. . . . It seems that the essential element in equalization is the determination of the common denominator or yardstick. Without such a yardstick it is impossible to measure variation in assessment levels in different areas and for different classes of property. Since assessments are supposed to be according to value, value must be our yardstick and our concept of value must be clear and certain." MAYNARD, THE ILLINOIS PROGRAM OF EQUALIZATION, PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 268-269 (September 1949).

ord was ambiguous concerning whether the federal questions had been decided by the Supreme Court below. The 1965 opinion of the Court below provided only a fleeting glimpse into the basis of the decision: "discrimination."[4] Moreover, there was uncertainty here about whether the federal questions had been before the Court below during the first appeal to that Court, not because of lack of presentation, but because it was arguable, during the first appeal to this Court, that the only points before the Court below in 1965 were the points raised by the railroads in challenging the trial court's 1964 judgments which the railroads had appealed. The People, represented by the Tax Collector and the State's Attorney, were then **defending** those 1964 judgments. Accordingly, the defensive points made by the People before the Supreme Court of Illinois in 1965 included federal questions which were arguably hypothetical in the sense that they were directed against judgments which had not then been entered but which might in the future be entered as a result of the impending decision of the Court below. When the Supreme Court of Illinois in 1965 did reverse the trial court's 1964 judgments and ordered new judgments be entered on remand, its opinion gave no indication whether it had considered and decided the federal questions. Such was the Record before this Court on the first appeal here.

The 1965 judgments appealed to this Court were not final. Hence, there was no point in this Court's taking action in the first appeal here to clarify the basis of the 1965 decision below. See, *e.g.*, Note, "Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision," 62 Col. L. Rev. 822, 831-3 (1962). With deference we submit that the reasonable grounds for the Court's dismissal of the first appeal "for want of jurisdiction" may well have been a combination of the ambiguous state of the Record concerning the disposition

[4] Jurisdictional Statement A-11, 12, 23.

by the state court of the federal questions and the lack of finality of the judgments appealed.

The first appeal to this Court was necessary in the event that the 1965 judgments below were deemed final. The second appeal to the Supreme Court of Illinois, which resulted in the 1967 judgment now appealed to this Court, was necessary not only to establish finality but also to clarify whether or not the federal questions had been decided in 1965, and, if they had not, to obtain a ruling on them from the state court of last resort. Therefore, during the remand proceedings before the trial court the Appellant explicitly preserved the constitutional questions in a statement filed with the trial court. (The statement is in the Record.) Thereafter, on April 20, 1966, the trial court, despite the presentation of the federal questions, obeyed the mandate of the Supreme Court of Illinois and entered new judgments. Then Appellant filed notices of appeal to the Court below, again asserting the constitutional questions. One of these questions was not a federal question, *i.e.*, whether the April 20, 1966, judgments violated the uniformity clause of the state constitution. When we advised this Court of these developments during the first appeal here from the 1965 judgments by filing copies of the documents with the Clerk and by reciting the facts in our Brief in Opposition to the Appellees' Motion to Dismiss, it became apparent, due to the ambiguous nature of the 1965 opinion of the Court below, that, in then pending second appeal to the Court below, the Supreme Court of Illinois could decide the case in our favor on an independent state ground. That possibility has been exhausted and, we submit, the federal questions are now unavoidably before the Court.

II. The Appeal is Timely.

Appellees assert at 10-12 that the final judgments in this litigation under 28 U. S. C., § 1257, were the April

20, 1966, remand judgments entered by the trial court and not the 1967 judgment of the Court below. Support for our position that the 1967 judgment was the final judgment derives in part from the consideration that not until the entry of the 1967 judgment could it be or was it clear that the Supreme Court below had decided the constitutional questions in the first appeal. We invite the Court's attention to the fact that during the **second** appeal the Court below considered briefs of the parties **on the merits of the constitutional questions and heard oral argument.** (The documents are in the Record.) Appellees' presentation at 7-8 fails to communicate that prior to the filing of briefs in the second appeal to the Court below, the Supreme Court of Illinois denied Appellees' Motion to Dismiss the appeals because of the prior adjudication and thereafter granted plenary consideration to the questions presented. (We believe the Motion and ruling are in the Record.) In our view, the Court below, given its conclusions, should, after considering briefs and arguments both on the merits and on the issue of the binding effect of the prior decision, have affirmed the April 20, 1966, judgments, not dismissed the appeals from them. **Vischer v. Northwestern Elevator Rr. Co., 256 Ill. 572-574 (1912).** In any event, the dismissal was tantamount to affirmance.

Even if the Court below considered itself bound on the second appeal by the determinations in the first appeal, and even if the second appeal had been a mere formality, which it was not, the second appeal would still be a prerequisite to this Court's review. **McComb v. Commissioners, 91 U. S. 1, 2 (1875); Great Western Tel. Co. v. Burnham, 162 U. S. 339, 341-3 (1896).**

We submit that the argument of the Appellees that the remand judgments entered by the trial court constitute the final judgments for the purpose of determining federal jurisdiction is not persuasive in a situation where,

at the time the trial court entered judgments on remand, the remanding state court of last resort had failed to reveal in its decision whether it had decided the federal questions. If the Appellant had appealed the April 20, 1966, judgments directly to this Court, while necessarily pursuing the second appeal to the Supreme Court of Illinois, the Appellees could have made here a persuasive argument that the April 20, 1966, judgments were not final. Moreover, Appellant, for the second time, would have brought to this Court a Record—from the trial court—which still remained ambiguous as to whether the federal questions had been decided by the state court of last resort. Appellees' argument would require that Appellant have perfected three appeals to this Court.

Even if, *arguendo,* the April 20, 1966, judgments were final for purposes of federal jurisdiction, the Supreme Court below had jurisdiction to review them. The one case cited by the Appellees to support their position, at 11, holds only that a trial court judgment on remand **may** be a final judgment. The case does not involve the question of the point in time from which the time for filing a notice of appeal begins to run. In the case at bar, time began to run from the date on which the petition for rehearing in the Court below was denied in 1967; *i.e.,* the date when that Court finally refused to disturb the trial court's April 20, 1966, judgments. **American Railway Express Co. v. Levee, 263 U. S. 19, 20-21 (1923).**

III. Appellant's Presentation of Federal Questions Was Timely

At 15 Appellees contend that Appellant did not timely raise the federal questions in the Court below during the 1965 appeal to that Court. We cannot comprehend this argument in view of the fact that the Supreme Court

of Illinois in its 1967 decision made clear that these questions had been decided in its 1965 decision.[5] **Cumberland Coal Co. v. Board, 284 U. S. 23, 24 (1931).**

IV. Appellees' Motion Obscures Uniformity Clause Enforcement by the Supreme Court of Illinois Requiring Valuation of Non-Railroad Property According to Inflated Prices Notwithstanding the Administrator Had Valued Non-Railroad Property Without Regard to Inflated Prices in Equalizing Local Assessments

Appellees at 17 omit mention of four decisions of the Supreme Court of Illinois which set the stage for the case at bar. When the trial court in 1964 valued non-railroad property in response to railroad charges of discrimination, it relied on the sales ratio studies conducted by the staff of the Director of Revenue. These studies are based on current—and therefore inflated—prices. In this action the trial court was bound by **People ex rel. Hillison v. CB&Q, 22 Ill. 2d 88, 96-99 (March 29, 1961); People ex rel. Kohorst v. GM&O and C&NW, 22 Ill. 2d 104-112 (March 29, 1961); People ex rel. Wenzel v. C&NW, 28 Ill. 2d 205 (May 27, 1963); People ex rel. Enrietta v. GM&O, 29 Ill. 2d 605, 609-11 (November 26, 1963).**[5a] In these four property tax discrimination cases, the Supreme Court of Illinois had as a matter of sound economics and specific data,

[5] See 5-7 *supra;* also, Jurisdictional Statement A-2, 3, 4. The Court below concluded in the 1967 decision, "This is a deliberate attempt to relitigate the *same* issues presented in the prior appeal" (emphasis added). Cases concerning the timely raising of points in a Petition for Rehearing include *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U. S. 673, 677-8 (1930); *Ohio ex rel. Bryant v. Akron Park District,* 281 U. S. 74, 79 (1930).

[5a] While these cases were based on records which contained full evidence concerning the sales ratio studies and the Director's having ignored the results of the studies in certifying equalization multipliers to the counties—evidence sponsored by the railroads—the records did *not* contain the data which permitted the Court to perceive the equalizing function of the "judgment factor" reductions in the administrative formulation of railroad property assessments. See n. 15 at 19 *infra.*

undiluted by "judgment," ruled that the value of non-railroad property must be determined according to the sales ratio studies. The Court had determined in the four cases that the Director of Revenue (the responsible official in charge of the Department of Revenue) had failed to increase local assessments to the full value established by these studies, even though the Director had been under a statutory **duty** to increase local assessments to full value.[6] The Court had rejected the contention that in valuing non-railroad property it should adopt the "judgment" of the Director, who had ignored the results of the sales-ratio studies. See **People ex rel. Hillison v. CB&Q, 22 Ill. 2d 88, 98-99 (1961).** The Court had four times found that the Director of Revenue had violated the state's uniformity clause. Appellees' representation at 17 that the valuation of locally assessed property based on inflated prices was "done by the trial court . . . and the Supreme Court accepted that decision" is misleading. Appellees' statement at 24, "The Department performed its equalization functions upon the facts disclosed by sales-assessment ratio studies" is false.[7] The Supreme Court of Illinois found just the opposite.

Appellees at 25 deny that the determination of the level of assessment of non-railroad property by reliance on the sales ratio studies means valuation based on inflated prices.

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[6] Appellees state at 9 only that the Director was "empowered" to increase local assessments to full value. See Jurisdictional Statement A-56, 57 for the statutory "shall."

[7] In addition to testimony by two members of the Director's staff, the Record contains testimony by Appellees' own witness, economist Rolf Weil, a former staff member. This testimony establishes beyond question that the Director ignored these studies in performing his equalization functions with regard to locally assessed non-railroad property. See also Weil, "Property Tax Equalization in Illinois," NATIONAL TAX JOURNAL (June 1953); *accord,* Pealy, "A Comparative Study of Property Tax Administration in Illinois and Michigan" 99 (1956) (Bureau of Government, Institute of Public Administration, University of Michigan).

Appellees' denial reflects no understanding of the nature of the sales ratio studies conducted by the staff of the Director of Revenue and of those underlying the Bureau of Census determinations. The Record contains much evidence, most of it sponsored by the railroads, about these studies and the suppression of their inflationary results by the Director in the certification of equalization multipliers to the counties.[8]

V. Appellees' Motion Obscures Uniformity Clause Enforcement by the Supreme Court of Illinois Requiring Valuation of Railroad Property Without Regard to Inflated Prices and Increased Investment by Offering Irrelevant and Misleading Material to Rationalize the "Judgment Factor" Reductions Used by the Administrator to Assess Railroad Property Without Regard to Inflated Prices and Increased Investment

At 20-24 Appellees offer a misleading rewriting of administrative history in Illinois concerning valuation of

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[8] An assessment-sales ratio study involves an annual study relating (sometimes on a sampling basis, sometimes on a total basis) sales prices, for the year or shorter period under study, of real estate, mostly residential, agreed upon between buyers and sellers in arms length transactions, with corresponding equalized assessments of the traded properties. The relationship of assessment to price for all measurable or sampled transactions in the jurisdiction studied are statistically combined and appropriately weighted to produce a ratio for each county and for the entire state. Assessment-sales data permit nothing more than the derivation of ratios. These ratios do not produce the "level of assessment" *unless* it is decided that current prices are to be the sole criteria of value. (The relation of two numbers known as the "level of assessment" connotes a knowledge of two facts: assessment and value.) Once the decision is made to base value solely on current prices, the ratio automatically provides the level of assessment, and the value of locally assessed property is automatically imputable from the ratio. Thus, if the locally assessed property assessment-sales studies produce a ratio of equalized assessment to price of 50%, and the sales prices alone are to determine value, then one need only double the equalized assessments in the county or state in question to arrive at full value. In the example, if equalized assessments of local property total $1,000,000, then the value of that property is $2,000,000 because assessments are 50% of sales prices.

railroad property.[9] In doing so, they indulge an erroneous premise which denies that this case is on a constitutional level, and, therefore, action of the administrative process (and of the legislative process) is controlling. Inconsistently, Appellees abandoned that premise in arguing that the State court should find that the administrator had not increased local assessments to full value. On a constitutional level, neither is controlling, certainly not when administrative valuation of railroad property and administrative equalization of railroad property assessments with non-railroad property assessments were integrated obscurantly into the single act of assessment.

Appellees quote portions of administrative reports out of context, bringing to the Court's eye only language which acknowledges defects in one of the three elements of value which make up the traditional administrative valuation formula. In fact, the reports also discuss defects in the other two elements of value, thus explaining why, as this Record further explains, all three elements of value are used and averaged.

The quotation in n. 6 at 21 was for the year 1933, precisely the time when trained economists began to develop the articulated formula which gave equal weight to the three elements of value. At 92 of the Report for 1939-40 (I Ex.), the Tax Commission wrote,

> "With all its shortcomings, a good formula will produce results having advantages which far outweigh the disadvantages that an undocumented judg-

[9] Not the least of the misstatements in the Appellees' motion is the statement that "The principal guide of Raymond S. Danis, as railroad assessor for the years 1933-1960, inclusive, was the capitalized earnings of a railroad . . . ." The Record is unequivocally clear that Danis was not the staff man in charge of railroad property assessments before late 1949, although his civil service title might indicate that he was. That his principal guide after 1949 was *not* capitalized earnings may be ascertained by a study, *inter alia*, of the data 1951-55 in Appendix H of the Jurisdictional Statement.

ment brings about. It lends a certainty and definiteness to the assessment process which safeguards not only the tax administrator but the taxpayer as well . . . as long as the rules governing the use of a formula are uniformly applied, any modification of the result can be limited to a consideration of evidence not taken into account in the formula."

At 3 of the Report for 1941-42 (I Ex.) the Tax Commission wrote, "It should be emphasized in the first place that other factors than income are taken into account in arriving at railroad assessments; stock and debt valuations, as reflected in market quotations, and I. C. C. reproduction cost figures both are factors of great significance in reaching conclusions respecting the full, fair cash value of railroad property."

Appellees' effort to rationalize the "judgment factor" as a part of the valuation formula (hiding the nature of the "judgment factor" as an administrative equalization technique which suppressed inflation reflected in the value formula's average[10]) is discredited by the numbers in Appendix H in the Jurisdictional Statement as well as a perusal of Peo. Ex. 112, the 1949 memorandum of the Director's railroad assessor, Lynn A. Stiles, an economist. Appellees' rationalization is further undermined by the published report of the economist and railroad property valuation expert, John A. Gronouski, Jr.:

"In deriving a single valuation figure on the basis of evidence employed, the states are divided between the use of a formulaic and a judgment approach. Illinois, for example, takes a simple average of reproduction cost depreciated, capitalized earnings, and

[10] In a non-constitutional case, the Supreme Court of Illinois rejected the exercise of administrative judgment which suppressed inflation in determining the value of telephone company property for rate making purposes. *Ill. Bell Tel. Co. v. Ill. Com. Co.*, 414 Ill. 275, 288, 290 (1951).

stock and debt value." **The Taxation of Utilities, Michigan Tax Study (Staff Papers) 306 (1958).**

Appellees' rationalization of the "judgment factor" also conflicts with testimony of the Director of Revenue:

> "As I said before, for 1961 and 1962, we determined what we thought, **in order to hold the line, a** full, and **assessed** value for all railroads in the State of Illinois . . . in 1961 . . . the judgment factor was varied in the railroads so as to arrive at a billion thirty-two million. In 1962 we determined the overall value to be 990 some million, and again we varied the judgment factor for the railroads to arrive at some 990 some million . . . Well, that was the easiest way out . . . **Keep it about the same as it was the year before . . . my thoughts had nothing to do with how much the railroads were earning or what their earnings should be, could be . . . If I am going to be truthful, it was an arbitrary assessment decision** [to reduce industry assessment 4%]." VI Test. 1072-73, 1086, 1090, 1091, 1095.

On June 15, 1963, a Commission on Revenue appointed by the state legislature transmitted a now published Report to the Governor. Chapter XIV of this Report, entitled "State Equalization of Local Assessments," written by Dr. H. K. Allen, contained this statement, "No criticism of the personnel of the Department of Revenue is intended. The Department has on its staff many highly competent and dedicated individuals. The incumbent Director of Revenue has 'inherited' the present situation from his predecessors."

Appellees present figures and charts, some incomplete, some misleading, in an effort to emphasize downside problems of the railroad industry, 1957-1961, arguing that the "judgment factor" was a value reflection of

such conditions. Appellees omitted Record data revealing an upturn in 1962 and increasing investment in property during and after the 1950's reflecting modernization of plant and equipment and decreasing obsolescence. (Nevertheless, the "judgment factor" reductions increased.) In any event, the downside statistics were already reflected in the capitalized earnings and the stock and debt measures of value. Moreover, the "judgment factor" reductions developed in an earlier period, when upside statistics predominated, *i. e.*, 1950-55. Appellees overlook the fact that this case concerns the value of railroad property—not the value of railroad companies—vis à vis the value of non-railroad property. Expert opinions on the value of Appellees' property, sponsored by the Appellees, simply eliminated inflation and investment from consideration. These experts did not testify about the influence of inflation in the valuation of non-railroad property.

Plenary consideration of the complex Record will confirm that the facts which frame the questions presented are clear and limited in number.

Mr. Justice Holmes has written:

> "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that one necessarily involves the other, the Federal Court must examine the facts. Otherwise, the right will be a barren one." Frank v. Mangum, 237 U. S. 309, 345, 347-8 (1915) (dissenting opinion).[11]

His observation has been confirmed time and time again as illustrated by the cases cited at "E" at 7 of the Jurisdictional Statement. This appeal involves whether

[11] At 23 Appellees repeat a misquotation of Justice Holmes purportedly concerning valuation of a railroad's property. Compare the quotation with the Justice's text and context at 204 U. S. 598, 636 (1907).

the refunds to the railroads shall be according to the trial court's 1964 judgments, or according to its 1966 judgments as mandated by the Supreme Court of Illinois.

VI. Challenge by a State of the Validity of Action by the Supreme Court of That State Does Not Defeat This Court's Article III Jurisdiction

Appellees' first sentence in the last paragraph at 14 suggests the point that because the State of Illinois, or the executive branch of the State, represented by the Tax Collector and the State's Attorney, assert the invalidity of action by the Supreme Court of Illinois, this case does not come within the Article III jurisdiction of the Court.[12] The underlying argument appears to be that a party cannot challenge itself before this Court.

This point is without merit. "Case and controversy" was found to exist in a dispute between state officials in **Coleman et al. v. Miller, Secretary of the Senate of Kansas, 307 U. S. 433 (1939).** Similarly, "case and controversy" was found to exist in a case where the United States sued itself. "United States v. United States, et al.," cited as **United States v. ICC, 337 U. S. 426, 430 (1949).** There is no reason why the holding in the latter case does not serve to reinforce the holding in the **Coleman** case.

We submit that these cases in which the branches or members of state and federal government were the contending **parties** support our position *a fortiori.* Here there is a "case and controversy" **between the State and the railroads. Alaska v. American Can Co., 385 U. S. 224 (1959)** (jurisdiction to consider argument by Attorney General that legislative enactment as interpreted was, or would be unconstitutional). **Penn. v. Nelson, 350 U. S. 497 (1956).**

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[12] Appellees erroneously added that Appellant challenges action of the Department of Revenue. See n. 3 at 5 *supra.*

STANDING

I. One or More of the State of Illinois, the State's Attorney and the Tax Collector Have Standing to Assert the Constitutional Invalidity of the Action of the Court Below

Appellees' presentation at 13-14 constitutes an argument that Appellant lacks standing to present the constitutional questions. Appellees agree that the State is the Appellant. However, Appellees have erroneously intermingled the argument with certain independent jurisdictional points. We understand that the question of standing does not go to the Court's jurisdiction but only to its exercise. **E. g., Burrows v. Jackson, 346 U. S. 249, 257 (1953).**

Appellees observe that the Fourteenth Amendment creates rights for "persons," *e.g.*, the non-railroad taxpayers of Madison County and Illinois, which protect against discriminatory property taxation resulting from state action. Appellees then move to the *non-sequitur* that because no non-railroad taxpayer in his individual capacity is a party to this case, the Court is without jurisdiction. Even if it is assumed that no non-railroad taxpayer is personally before the Court,[13] Appellees' observation suggests only the question of standing of the Appellant to present the Fourteenth Amendment questions.

We invite the Court's attention to the impressive pocketbook injury sustained by the non-railroad taxpayers in Madison County and throughout Illinois. The action of the Court below requires that the non-railroad taxpayers of Madison County bear a discriminatory share of the tax burden, 1957-62.[14] State assessment of railroad prop-

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[13] The assumption is questionable. The Tax Collector, Mr. John Maeras, *qua* individual, was a property taxpayer in Madison County, 1957-62.

[14] The Court below found railroad property taxed at 100% of full value and non-railroad property at 50% of full value. Therefore

erty as a unit rendered it necessary for the trial court and the Court below to value the state-wide properties of the Appellees in order to determine a level of assessment for Appellees' Madison County properties. Therefore the Supreme Court of Illinois' action controls valuation and the level of assessment of railroad properties in other counties and thereby has served to decrease the railroad's share of the tax burden in other counties.[15] Moreover, the present and future share of the property tax burden borne by the non-railroad taxpayers in Madison County and throughout Illinois is discriminatorily increased by the state action challenged here.[16]

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the Court below ordered refunds to the Appellees amounting to 50% of their taxes. If the Court below had affirmed the trial court's judgments, it would have approved determinations that railroad property was taxed at about 70% of full value, with inflation and investment given *only* one-third weighting; and if the trial court's judgments are taken as the guide, the effect of the 50% refund of railroad property taxes is to tax the railroads' property at 35% of full value for 1957-62, while other property, as the Court found, was taxed at 50% of full value. The deficit in collections vis a vis tax levies must be made up by the non-railroad taxpayers whose property comprises more than 95% of the tax base.

[15] Only after the decision of this case by the Court below, could no one contend that the Supreme Court below has not had all the evidence presented to it with regard to the deflationary function of the "judgment factors." The trial court noted the dearth of evidence on railroad property valuation and assessment in the Records of the predecessor *Hillison* and *Kohorst* cases, as had the Court below. See Jurisdictional Statement A-40 n. 20, A-47. See n. 5a at 10 *supra*.

An aid to understanding the position of the Court below in confronting the illuminating Record in this case, developed by the People in the trial court and taken to the Court below by the railroads, is Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 115 (1921).

[16] At 29 Appellees state that since 1963 the Director of Revenue, pursuant to legislative command, has been explicitly reducing fair cash value determinations of railroad property to the level of assessment of locally assessed property. Railroad valuations, the railroads assert, are now being reduced 50% to reach the assessment figures. That is because the level of assessment of locally assessed property is being derived by use of the sales ratio studies, which means 100% reliance on inflated prices. Appellees state that there have been practically no discrimination objections by

We also invite the Court's attention to the interest and status of the State, the State's Attorney, and the Tax Collector. Sources of the power and status of the State's representatives are detailed in n. 4 at 4-5 of the Jurisdictional Statement. The State has an interest in the proper functioning of the property tax system, which provides most of the support for local government, including the public schools. In addition, it has an interest in, and a responsibility for, the rights of its People. Indeed, the State is both the creation of and agent for the People. **The State has more than an interest in the application of state constitutional provisions, especially those which can be judicially applied by the State's Judiciary so as to create discrimination violative of the federal constitution.** The State's Attorney, a constitutional officer, stands in the place of the Attorney General, both of whom have concurrent powers at common law to represent the State in matters affected with a public interest and both of whom have concurrent statutory power to represent the State in tax objection proceedings in which action by the State legislature or State executive may be challenged by a taxpayer. The Tax Collector is under a duty to collect the taxes extended by the appropriate officials as the result of action by the State's chief tax administrator, the Director of Revenue. That duty includes the defense of the Director of Revenue's actions in tax objection proceedings. The Tax Collector does not assert the invalidity of state court action as an excuse not to perform the duty of collecting taxes. To the contrary.

We submit that the unique type of proceeding which has produced the federal questions presented is of consequence. The statutory tax objection proceeding does

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the railroads since 1962. But due to the constitutional action of the Court below, the fair cash values of railroad property which are being reduced by the administrator by 50% do not reflect post World War II inflation and increased investment. As a result, state-wide discrimination against non-railroad property taxpayers exists, the fate of which turns on the outcome of this appeal.

not allow for any parties other than the State and the taxpayer who challenges the State's executive or legislative action. Therefore, with regard to discrimination issues, the persons affected by an invalid decision of the State court in the proceeding have no opportunity to assert or vindicate their rights before the State court or this Court. We are aware of no remedy, short of constitutional amendment, by which the non-railroad taxpayers themselves may seek to undo the discrimination against them created by the Court below, which constitutes a "continuing wrong."

A. The Question of Appellant's Standing Is a Matter of State Law and Is Not Open Here

In Illinois the State may act as *parens patriae*. See n. 4 at 5 of Jurisdictional Statement. Indeed, public officials have standing to challenge the constitutionality of state action. **People ex rel. Isaacs v. Johnson, 26 Ill. 2d 268 (1962).** Congress has evidenced the intent that decisions of the highest court of a state involving federal questions shall be reviewed if jurisdictional requirements are met. Article III, § 2, U. S. Constitution; 28 U. S. C., § 1257. We submit that if a State has standing or confers standing on a public official to raise a federal question concerning **state action** in the state courts, then in deference to the intent of Congress and the States, state law on standing should control. The Court below accorded Appellant standing.

Heim v. McCall, 239 U. S. 175, 186-7 (1915);
Doremus v. Board of Education, 342 U. S. 429, 435, 436 (1952). (dissenting opinion).

B. Even if Appellant's Standing Is a Federal Question, It Is Not Open Here

Appellees failed to object to the Appellant's standing in the proceedings below. Appellees did not object to Appellant's standing during the first appeal to this Court.

C. The State of Illinois Has Such an Interest in and Responsibility for the Preservation of the Fourteenth Amendment Rights of Its People Against State Action, That It Has Standing Under the Doctrine of *Parens Patriae* or for Other Reasons

Georgia v. Pa. Rr. Co. et al., 324 U. S. 439, 445-450 (1945);

Massachusetts v. Mellon, 262 U. S. 447, 485 (1923) (*dictum*);

cf. Penn. v. West Virginia, 262 U. S. 553, 564, 583-4 (1922);

cf. Georgia v. Tennessee Copper Co., 206 U. S. 230 (1906);

cf. Kansas v. Colorado, 185 U. S. 125, 142 (1901).

D. Even Though Non-Railroad Taxpayers Are Not Parties to This Appeal, Their Official Representative(s) Have Standing to Assert Their Constitutional Rights

This Court has recognized the standing of officials to assert federal questions, including constitutional ones, even though the interest of the officials does not involve their personal pocketbooks. **U. S. ex rel. Chapman v. FPC, 345 U. S. 153, 155-56 (1953) (Secretary of Interior v. FPC); U. S. v. ICC, 337 U. S. 426 (1949)** (the United States and its Attorney General); **Alaska v. American Can Co., 358 U. S. 224 (1959)** (Alaska and its Attorney General); **State Tax Com. v. Aldrich, 316 U. S. 174 (1942)** (*semble*); **Coleman v. Miller, 307 U. S. 433 (1938)** (semble); see **Coleman v. Miller** *supra* **at 433, 442-45 (1938).**

Appellees' principal reliance is on **Columbus & Greenville Rr. Co. v. Miller, 283 U. S. 96, 100 (1931)**, which is distinguishable. There, the Mississippi Tax Collector, acting for the Mississippi Levee District, not, as here, for the State, asserted the invalidity of legislation as an excuse **not** to collect the amount of taxes prescribed by the statute in question. Thus, in **Miller**, the Tax Collector chal-

lenged action of his creator, the legislature. *Id.* at 99. Here, the Tax Collector asserts the invalidity of judicial action in the discharge of his duty to collect taxes. It is of significance that in **Miller** the Tax Collector acted without the participation of a legal officer of the State. Here, the situation differs. Indeed, **Miller** is traceable to earlier cases in which the State, represented by the Attorney General, was opposing the official asserting the invalidity of the legislative action.

E. Representative Parties With Less Than Pocketbook Interest Have Standing to Assert the Rights of Others

For example, a private school had standing to assert here that state action violated the rights of parents, none of whom were before the Court. **Pierce v. Society of Sisters, 268 U. S. 510, 534-35 (1925); NAACP v. Alabama, 357 U. S. 449, 458-60 (1958)** (organization has standing to assert rights of its members).

F. Reasons Which Underlie the Court's Rule of Standing Are Outweighed by the Need to Protect Fundamental Rights of the People of Illinois

In **Barrows v. Jackson, 346 U. S. 249, 253, 257 (1953)**, a Caucasian was allowed to assert constitutional rights of non-Caucasians not before the Court. There, the state action challenged was **judicial.** In recognizing standing, the Court stated,

> "But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any Court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the funda-

mental rights which would be denied by permitting the damages action to be maintained." (Emphasis not added.)

G. The State Has Standing as Proprietor and Operator of Various Institutions of Government

Georgia v. Pa. Rr. Co., et al., 324 U. S. 439, 445-50 (1945). The State of Illinois as proprietor has been injured. The practical effect of the action of the Court below is to deprive the State of revenue. There is an upper limit on the property tax burden which the People will accept. To superimpose on this burden taxes which the railroads should pay will cause that upper limit to be reached sooner than if the railroads pay their proper share—if that upper limit has not been reached or passed already.

CONCLUSION

For the foregoing reasons, we pray the Court to note probable jurisdiction.

Respectfully submitted,

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December 8, 1967